

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

PHILIP HARRY MARSHNER	:	
Petitioner	:	
v	:	Civil Action No. RDB-06-254
JON P. GALLEY, Warden and	:	
THE ATTORNEY GENERAL OF THE	:	
STATE OF MARYLAND	:	
Respondents	:	

oOo

**MEMORANDUM**

The above-captioned Petition for Writ of Habeas Corpus was filed January 30, 2006, pursuant to 28 U.S.C. § 2254. Paper No. 1. On February 28, 2006, this Court issued an Order requiring respondents to file a limited response addressing the timeliness of the petition. Paper No. 2. On March 24, 2006, Respondents filed an answer alleging that the petition is untimely and should be dismissed.<sup>1</sup> Paper No. 3. Petitioner has filed a reply to the answer alleging that the merits of the petition should be considered by this court. Paper No. 5. Upon review of the papers filed, this Court finds further response from Respondents is necessary.

On February 24, 2003, Petitioner plead guilty to one count of distribution of cocaine and two counts of possession with intent to distribute in the Circuit Court for Queen Anne's County. Paper No. 3 at Ex. 1. Pursuant to his guilty plea, Petitioner was sentenced to serve 45 years in prison on April 14, 2003. *Id.* Petitioner did not file an application for leave to appeal after his guilty plea; accordingly, his conviction became final on May 14, 2003, after the time for filing leave to appeal had expired. *See* Md. Cts & Jud. Proc., Code Ann. § 12-302(e). Petitioner filed

---

<sup>1</sup> The answer served on Petitioner included the exhibits as required pursuant to *Thompson v. Greene*, 427 F.3d 263, 268 (4<sup>th</sup> Cir. 2005). *See* Paper No. 3.

a Motion for Review of Sentence by a Three Judge Panel on May 9, 2003, which remained pending until July 21, 2003. Paper No. 3 at Ex. 1. On November 26, 2003, Petitioner filed a post-conviction petition in the Circuit Court, but withdrew the petition without prejudice on January 29, 2004. Paper No. 3 at Ex. 1. If Petitioner's Motion for Review of Sentence tolled the one-year filing period for federal habeas, then at the time the post-conviction petition was withdrawn, the statute of limitations for filing federal habeas petition had been running for four months, between July 21, 2003 and November 26, 2003. On September 7, 2004, 23 days before the expiration of the remaining eight months of the one-year limitation period, Petitioner filed a second post-conviction petition on which a hearing was held on February 7, 2005. *Id.* Post-conviction relief was denied by Order dated May 2, 2005. *Id.* Petitioner filed an application for leave to appeal, but it was summarily denied by the Court of Special Appeals of Maryland on December 14, 2005. *Id.* at Ex. 2. The Court of Special Appeals' mandate issued on January 17, 2006. *Id.* At that time, Petitioner had 23 days remaining on the one-year filing deadline for a federal habeas petition. The instant petition was filed on January 30, 2006. Respondents fail to address whether the motion for review of sentence was a properly filed post-conviction proceeding that tolls the one-year filing limitation imposed by 28 U.S.C. § 2244(d)(2). Petitioner asserts in his Traverse, that it does in fact toll the period and, if he is correct in his assertion, the instant petition has been filed in a timely manner.<sup>2</sup>

Respondents will be directed, by separate Order which follows, to address the issue

---

<sup>2</sup> Petitioner also asserts in his Traverse that Respondents have failed to include the 90 day period he had to file a petition for writ of certiorari with the United States Supreme Court for determining the date his conviction became final. Paper No. 5 at p. 2. The 90 day period of time referred to by Petitioner is, however, inapplicable in this case because an application for leave to appeal with the Court of Special Appeals was never filed following his guilty plea.

regarding whether the motion for review of sentence operates to toll the filing period in this case.

Upon receipt of Respondents Answer, Petitioner will be provided an opportunity to reply.

April 27, 2006  
Date

/s/  
\_\_\_\_\_  
RICHARD D. BENNETT  
UNITED STATES DISTRICT JUDGE